

Court referral and Nigeria's Financial Regulation Advisory Council of Experts (FRACE)

FRACE or
Court referral

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Received 16 November 2018
Revised 2 January 2019
15 February 2019
5 May 2019
10 May 2019
31 May 2019
Accepted 31 May 2019

Abstract

Purpose – This paper aims to highlight resolution of Islamic finance dispute by common law-oriented courts in Nigeria with respect to Shari'ah non-compliance and legal risks thereof, as well as the lesson to learn from Malaysia in that regard. This is with view to ensuring Shari'ah compliance and legal safety of Islamic finance practice as prerequisites for sustainability of the Nigerian Islamic finance industry.

Design/methodology/approach – A qualitative method was used; interviews were conducted with different categories of experts and primary data collected in relation to Shari'ah non-compliance and legal risks in adjudicating Islamic finance dispute by civil courts and the role of expert advice as basis for court referral to Financial Regulation Advisory Council of Experts. A doctrinal approach was adopted to analyse relevant legislative provisions and content analysis of secondary data relevant to applicable provisions in matters of finance before civil courts.

Findings – The paper discovers an indispensable role of conventional financial regulations in sustaining Islamic finance industry. Appropriate laws for Islamic finance under the conventional framework foster legal safety and Shari'ah compliance of Islamic finance activities in related cases handled by courts. Nigeria civil courts can aid sustainability of Islamic finance when so equipped and enabled by laws that address apparent Shari'ah non-compliance and legal risks in judicial dispute resolution. Inadequate legal provisions for dispute resolution breeds Shari'ah non-compliance and legal risks in Islamic finance, undermine its prospects and stand inimical to its sustainability.

Research limitations/implications – This research is limited by its focus on Shari'ah non-compliance and legal risks alone, which emanate mainly from judicial resolution of Islamic finance dispute by Nigerian civil courts.

Practical implications – This research seeks to motivate a determined and deliberate regulatory action and change in approach towards addressing apparent risks associated with Islamic finance while resolving disputes therein by civil courts. It has implications on common law jurisdictions generally that adopt similar approach as Nigeria's while introducing Islamic finance into their conventional finance framework.

Originality/value – Dispute resolution and other regulatory functions of civil courts are important to Islamic finance though apparently overlooked while introducing Islamic finance in Nigeria as in other emerging jurisdictions. This research ascertains the role of the civil courts as indispensable for Islamic Financial Institution (IFIs) operations and demonstrates that such courts are needed for the development and

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The authors would like to acknowledge the financial support provided by the Ministry of Higher Education Malaysia under UM-INCEIF Islamic Finance Research Grant No. MO010-2017.



sustainability of Islamic finance industry. The research demonstrates the end-to-end requirement of Shari'ah compliance of Islamic financial transactions as absolute and needs to be ensured and guarded at dispute resolution level by properly equipped courts.

Keywords Nigeria, Dispute resolution, Shari'ah compliance, Shari'ah governance, FRACE, Shari'ah advisory council, Islamic finance disputes, Shari'ah issues, SAC

Paper type Research paper

Introduction

Islamic finance has assumed an important place in Nigeria's banking and finance scene since its formal and full-fledged commencement in 2012. It is today a multibillion naira industry that comprises several institutions offering Islamic financial products and services. These include one standalone Islamic bank (Jaiz Bank Plc), two Islamic windows of conventional banks (Sterling Bank and Stanbic IBTC Bank), two *takaful* (Islamic insurance) companies (Jaiz Takaful, Noor Takaful) as well as sovereign *shukūk* (Islamic investment certificates) issuances (by state and federal governments) among other Islamic capital market activities. In addition, there are a few Islamic asset/fund management and investment companies that operate in the country. The industry comes with tremendous economic gains for Nigeria. The development and growth of the Islamic finance industry certainly bring about the chances of disputes in the transactions. So long as Islamic finance subsists as a viable alternative to the conventional financial system, the resolution of its disputes remains fundamental and needs to be catered for in that regard.

Disputes are generally considered inevitable in human dealings, especially in commercial transactions. Disputes could escalate to a point where contracts are terminally affected and, by extension, the underlying businesses as well. Resolving disputes amicably reduces the likelihood of differences or misunderstandings emanating from the operation of contractual relations. Dispute resolution mechanisms are crucial in the development of modern banking and financial dealings. Courts are central and play a critical role in this regard, as they determine underlying issues with finality to ultimately establish or disprove a particular contract or business conduct.

For Islamic finance cases, courts need to have an appropriate jurisdiction with mastery and expertise in the subject of Islamic commercial jurisprudence. Notably, as the Nigerian Islamic finance industry operates under the conventional legal and regulatory regime, the courts have jurisdiction on banking and finance. Nigeria's conventional courts' lack of expertise in handling matters of Islamic commercial jurisprudence and Islamic finance has been well established (Sambo and Abdulkadir, 2013; Oseni, 2011, 2015a, 2015b). Nonetheless, it is the courts that will hear such matters under Nigeria's Constitution and the law. A similar fate awaits Islamic finance cases in several other jurisdictions; for instance, in the USA, the UK and emerging Islamic finance jurisdictions in Africa such as Kenya, Tanzania, Cameroon and South Africa, among others (Ainley *et al.*, 2007; Faye *et al.*, 2013; Sulayman, 2015; Colon, 2018). The current practice among some jurisdictions is to refer intricate Shari'ah issues in Islamic finance cases for expert opinion, which in itself presents another challenge of uncertainty due to its variation and the subjectivity of individual experts' perceptions[1].

Accordingly, this motivated the researchers to examine how Islamic finance disputes bordering on Shari'ah (Islamic law) issues would fare before the current Nigeria's judicial dispute resolution mechanism. Obviously, an Islamic finance transaction would appear to be exposed to legal and Shari'ah non-compliance risks[2] by subjecting it to the working and procedure of the regular civil courts that lack expertise in Islamic financial jurisprudence.

This remains an anomaly that seems not to have received the deserved legal attention in relation to Islamic finance matters. While this situation holds, this research seeks to bolster and build upon existing regulatory and governance mechanisms. This is with a view to developing and enhancing the adjudicatory competence of the civil courts in Islamic finance matters towards a legally safe and Shari'ah-compliant decision. This is by referral of questions of Islamic finance or Shari'ah issues therein to a pool of Shari'ah scholars and experts at the Central Bank of Nigeria's (CBN's) Financial Regulation Advisory Council of Experts (FRACE)[3] for the ascertainment of applicable Shari'ah rules on such matters.

It is an obvious fact that several categories of experts are required for the smooth operation and sustainability of the Islamic finance industry. A person who is knowledgeable and skilful in some specialised field of human endeavour by virtue of his learning and training can be said to be an expert in that field. Circumstance would warrant experts to provide a court of law with an opinion on their particular endeavour during an expert-opinion elicitation. As far as Islamic finance is concerned, an expert can be a natural person of considerable learning, to a level of public and official recognition, in the theoretical and practical aspects of Islamic financial jurisprudence. An expert's opinion is sought as an informal verdict over an issue by virtue of his expertise therein. Though not decisive as a verdict, being open to argument, an expert opinion is held probable or true in the expert's mind (Ayyub, 2001). More often than not, such experts are required as crucial to ascertaining issues relevant to judicial resolution of Islamic finance disputes. Where helpful, it would be in line with the experts' viewpoints and deliberations thereon that such issues would be examined, analysed and determined by the courts in Islamic finance litigations. Without equivocation, under the extant Nigerian judicial system, this is the fate of matters arising from and out of the Nigerian Islamic finance industry.

Against this backdrop, the researchers in this work conferred with scholars and stakeholders and examined and analysed their viewpoints in the context of relevant practices in other jurisdictions. Unlike most of the existing works on Nigeria's Islamic finance dispute resolutions[4], this research employs a more distinct approach, i.e. qualitative, in examining relevant issues to propose reforms that will improve current practices. In effect, the research seeks to strengthen litigation, which is more readily available with respect to Islamic finance dispute resolutions. This is by facilitating the handling and addressing of Shari'ah issues in Islamic finance disputes by relevant courts with the aid of standardised and harmonised experts' opinion to resolve such issues arising in Nigeria's Islamic finance industry.

The paper is structured in the following way. The first part states the questions and methodology of the research. The second part highlights Shari'ah compliance as an inalienable fundamental that Islamic finance embodies and which should be ensured in every dealing. The third part details discussions on the significance of judicial resolutions in Islamic finance disputes; Nigeria's judicial dispute resolution process for Islamic finance; and the legal and Shari'ah non-compliance risks it entails. The fourth part highlights the establishment and functions of FRACE and the Advisory Committee of Experts (ACE)[5] as the Shari'ah governance mechanism for the ascertainment of Shari'ah compliance in Islamic financial transactions. This part elucidates FRACE's Shari'ah Governance Scope, Capability and Limitation. The fifth part examines court referral and the role of expert opinion in Islamic finance dispute resolutions; the general dearth of experts in Islamic commercial jurisprudence; and issues in court referral generally. This part also looks at court referral in Malaysia and how it works; and lessons therefrom for Nigeria. The sixth part charts the way forward for adjudicating Nigeria's Islamic finance industry disputes. The last part advances recommendations and concludes the paper.

Research questions and methodology

The research will delve into the following questions:

- RQ1.* How has Sharī'ah governance been provided for in the Islamic finance industry in Nigeria?
- RQ2.* How has Islamic finance judicial dispute resolution been provided for in terms of Sharī'ah governance under Nigerian law and what risks does Islamic finance face from extant judicial dispute resolution mechanisms?
- RQ3.* How would court referral to FRACE work and what lessons can Nigeria learn from Malaysia in terms of Sharī'ah-compliant judicial dispute resolution?
- RQ4.* What reform would court referral require to ensure that the lessons to be learnt are accommodated?

In the quest of investigating and finding answers to these questions, a qualitative methodology was employed, involving primary data collection through in-depth interviews over a period of five months (September 2017 to January 2018), to address salient issues raised by the work. The interviews were conducted with different categories of experts on various aspects of the Islamic finance industry, comprising:

- a judge of the Sharī'ah Court of Appeal, Abuja, Nigeria;
- the Executive Director of ISRA, international Sharī'ah scholar and member of FRACE;
- a university academician, Sharī'ah scholar, Advocate and Solicitor Supreme Court of Nigeria and member of the CBN's FRACE;
- an executive Director (Legal and Compliance) and General Counsel of the IILM (International Islamic Liquidity Management Corporation) and Advocate and Solicitor Supreme Court of Nigeria;
- an in-house solicitor, Head, Drafting and Litigation Unit, Legal Department of Jaiz Bank Plc., a standalone Islamic bank in Nigeria; and
- an Islamic finance consultant, formerly Sharī'ah scholar at ISRA and member of Advisory Committee of Experts (ACE) Sterling Alternative Finance, an Islamic window of Sterling Bank Plc, Nigeria.

Basically, all interviews were conducted on a face-to-face basis; three were held in Nigeria and three in Malaysia. Each interviewee was asked to discuss and share their understanding and opinions about: current provisions of law on Islamic finance in relation to judicial resolution of Islamic finance disputes in Nigeria; Sharī'ah governance of the judicial dispute resolution process; whether Nigerian civil courts are competently equipped to hear such disputes; legal risks and possible Sharī'ah non-compliance issues in judicial decisions of Islamic finance matters; lessons Nigeria can learn on Sharī'ah-compliant judicial dispute resolution; the way forward to aid the civil courts responsible for handling Islamic finance disputes and to sustain the burgeoning Islamic finance industry in Nigeria.

Accordingly, the questions elicited decisive responses from the interviewees, which were transcribed verbatim. Where relevant, the responses are directly quoted and analysed under different sub-headings in this paper, in the build up to results and findings of the work.

In the same vein, secondary data was also utilised comprising authoritative works on judicial dispute resolution generally and judicial processes for the settlement of Islamic

finance disputes under a conventional framework in particular. Along with primary data, the analyses and discussions of the work are presented hereunder.

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Sharī'ah governance and inalienable fundamentals of Islamic finance

Islamic finance is generally defined as conducting financial dealings in accordance with the rules of Sharī'ah. In other words, it is a financial system governed by Sharī'ah. Sharī'ah governance is said to encompass a series of organisational as well as institutional mechanisms established by regulators and players of the finance industry through which an institution offering Islamic financial services (IIFS) provides and safeguards effective independent supervision over processes and structures of governance to ensure it complies with the Sharī'ah (IFSB, 2009). The rules of Sharī'ah prescribe certain criteria of prohibitions and permissibility in dealings among people generally. The rules here basically comprise those on prohibition of *ribā* (usury and interest), *maysir* (speculation) and *gharar* (uncertainty including excessive risk). Additional prohibitions include *iktināz* (hoarding), *ihtikār* (monopolies), deception, gain without work or appropriate risk-taking for it, and investment in assets or activities that are non-*halāl* (non-permissible) including gambling and alcohol (Ghassen and Lahrichi, 2017). The prohibition of these activities is an inalienable fundamental of the Sharī'ah. Unlike in conventional finance, where these activities are legal, the Sharī'ah provides alternatives that link capital and work in participatory operations so that the responsibility to pay/work for legitimate products and services and lawful risk-taking offset those prohibited activities. Everything not contrary to the precepts of the Sharī'ah is considered permissible. The Sharī'ah is meant to bring *yusr* (ease) to people, and Islamic finance is meant to offer a just and innovative financing alternative in accordance with the dictates of the Sharī'ah (Ayub, 2007; Ainley *et al.*, 2007; Ahmed, 2014; MIFC, 2014; Rusni, 2016). Sharī'ah governance in Islamic finance embodies compliance with Sharī'ah in the way and manner institutions that offer Islamic financial services are operated. This includes how their financial contracts, services and products are initiated, conducted and concluded. In other words, Sharī'ah governance is synonymous to the end-to-end requirement of Sharī'ah compliance in Islamic financial practices and the operations of IIFS.

Relevance of courts in the adjudication of Islamic finance disputes

It is obvious that the objective of end-to-end Sharī'ah compliance in Islamic finance practices could be defeated if such compliance cannot also be assured at the judicial dispute resolution stage (Rasyid, 2013). Regardless of whether Sharī'ah compliance has been attained at the level of products/services development or contract performance, it is vital to ensure Sharī'ah compliance during judicial dispute resolution for a couple of reasons. A properly equipped court of law will facilitate the attainment of end-to-end Sharī'ah compliance by compelling Sharī'ah governance with judicial force. Conversely, an ill-equipped court may negate the attainment of that objective by its omission or commission. This could arise in the event a Sharī'ah-compliant Islamic finance product/service becomes the subject of a pronouncement and/or interpretation of its enabling law by the court in the light of other existing laws[6].

Importantly, a court's judgment serves as a precedent for other courts to potentially follow, in addition to subsequent and future cases where such pronouncements may be deemed binding as long as the dispute relates to similar facts and issues (Carnwath, 2012). This rule, known as judicial precedent, is an established common law doctrine that makes the lower court bound to follow superior court judgments. In view of this legal principle, it is the researchers' view that Sharī'ah compliance of Islamic financial transactions can be

ensured and sustained through judicial precedent as much as by the legal safety of the transactions themselves.

Islamic finance and the adjudication of its matters under Nigerian law

Islamic finance in Nigeria is practiced within the legal and institutional framework for conventional finance (Daud *et al.*, 2011). Except for CBN's regulatory guidelines that were issued between 2010 and 2011⁷, no legislation wholly envisages the idea, object and fundamentals of the Islamic finance industry or any of its peculiarities (Momodu, 2013; Oladimeji *et al.*, 2015). Except for section 61 of the Bank and Other Financial Institutions Act (BOFIA) 2004 that contemplates a 'profit-loss sharing' bank type, Nigeria's legal regime for the financial sector is altogether bereft of provisions contemplating Islamic finance and/or adjudicating its disputes. It is submitted that section 61 does not and cannot be the legal basis for the whole of Nigeria's Islamic finance industry that comprises Islamic banks, *takaful* and Islamic capital market activities. Under this circumstance, the operations of IIFS are eminently open to legal and Sharī'ah non-compliance risks (Lahsasna, 2014)⁸. This is particularly more so in the likely event Islamic finance disputes become the subject of determination before civil courts that lack expertise in Islamic finance (Buang, 2007; Hikmany and Oseni, 2016). The safety of a development-driven Islamic finance practice generally requires the right mix of positive and deliberate legislative as well as policy and regulatory actions. These would facilitate the attainment of financial inclusion of Muslims among other economic development and financial gains anticipated from the introduction of the Islamic finance industry in Nigeria (Soludo, 2007; CBN, 2010b)⁹. However, the Nigerian situation would contrast to the approach in Malaysia where laws and/or amendments of existing legal and institutional frameworks of finance were provided for to accommodate the introduction of a parallel Islamic finance system and its peculiarities (Mirakhor and Haneef, 2014).

Under Nigeria's 1999 Constitution (as amended), banking and finance are items that are categorised under the Exclusive Legislative List, which only the Federal Government can and does legislate¹⁰. The Constitution provides for Federal and State High Courts under sections 251 and 272 respectively and vests them with exclusive jurisdiction over banking and finance matters. This, by necessary implication, includes Islamic finance matters. It also implies the determination of Islamic finance matters in accordance with existing laws applicable to conventional finance (Ostien and Dekker, 2010). As the High Courts are primarily expert in hearing conventional banking and finance matters, it is contended that they would be ill equipped to hear Islamic banking and finance disputes, particularly on Sharī'ah issues¹¹.

However, Nigeria's Islamic finance industry being new and tender, it is noteworthy that no case on Sharī'ah issues in Islamic finance has so far come to the courts in Nigeria. Nothing, however, can guarantee that one will not come up at any time. As the industry grows and develops, disputes on such issues are virtually inevitable, as was the case in other jurisdictions¹².

In the course of conducting the interviews for this research, the question was raised of whether Nigerian civil courts are equipped and competent enough to determine Sharī'ah issues in Islamic finance disputes. One respondent, a judicial officer, was quick to respond thus:

As far as Nigeria's legal system and judiciary are concerned, I don't think there is anything in place regarding equipping Nigerian judges with Islamic finance knowledge. We have the National Judicial Institute (NJI), which is the body responsible for the training and re-training of judges I

attended so many programmes initiated by the National Judicial Institute but I don't think Islamic finance is part of it[13].

When confronted with the same question, an Islamic bank's solicitor and Islamic finance practitioner retorted[14]:

No, not at all. Why? This is because at the moment they have dearth of knowledge about Islamic finance principles. The judges in Nigerian courts were trained to adjudicate matters strictly based on the received English common law as well as Nigerian local laws, which are devoid of Islamic principles or devoid of Sharī'ah. So the challenge, which expectedly would come up, is how to handle issues relating to Sharī'ah principles. So, we are going to have some challenges in these judges deciding cases on Islamic finance because of their background.

However, some respondents hold the conviction that from the perspective of contracts alone the courts are equipped to determine matters, but they expressed their opinion that, unless aided by proper expert evidence and opinion, the courts are incompetent to delve into Sharī'ah issues. According to one of the respondents[15]:

Basically, the courts are equipped in terms of contract [...] that is focusing on contractual issues, which globally are handled by the civil courts [...]. When it comes to Sharī'ah issues, then there are problems, particularly if the Sharī'ah issue pertains to or if a party comes with Sharī'ah non-compliance defence: that the transaction is not Sharī'ah-compliant. How would the courts handle it? Here, the courts are not equipped [...] and that is where the problem lies. Now, under the common law as you are aware in Nigeria, the best they can rely on is expert opinion.

Another respondent[16] opined similarly:

Currently, I believe the courts are not equipped to decide on cases of Islamic banking and finance, simply because knowing Islamic law is one thing and being versatile and having a grip of the rudiments of Islamic banking and finance principles is entirely another. Without exaggerations, therefore, I strongly believe the courts would find it rather substantially difficult to listen to Islamic finance disputes with in-depth accuracy and full comprehension [...]. The only possible way out is to invite experts to give opinion, which the judge might consult as a way of persuasive evidence.

From the researcher's observation, this situation is anomalous to Islamic finance practices. Courts' lack of expertise in Islamic finance fosters uncertainty and the risk of such courts delivering rulings or judgments inimical to Islamic financial services, products and contracts or to render certain transactions nugatory. Accordingly, the court as an indispensable dispute resolution forum needs to be aided in handling Islamic finance matters. This is needful as part of Sharī'ah governance of such matters so that decisions on them can be Sharī'ah-compliant and legally safe for Nigeria's Islamic finance industry.

Establishment of FRACE, Sharī'ah governance and ascertainment of Sharī'ah in Nigeria's Islamic finance industry

As a governance strategy, certain mechanisms are established by the CBN via regulatory guidelines to provide for Sharī'ah governance as well as ascertainment of relevant and applicable rules of Sharī'ah for Islamic finance practice in Nigeria. These mechanisms are located at the level of both individual financial institutions and the CBN. They are bodies of Islamic finance experts which regulations require individual IFIs (including Islamic windows of conventional banks) and the CBN to establish and maintain in their respective domains. The composition and power of these governance bodies vary between those of individual IFIs and that of the CBN.

For the individual IFIs, paragraph 1 of CBN Guidelines on Shari'ah Governance for Non-interest Financial Institutions in Nigeria 2011 (Shari'ah Governance Guidelines)[17] requires all Non-interest Financial Institutions (NIFIs)[18] that are subject to supervision of the CBN to establish a Shari'ah Advisory Council (SAC) as an integral component of their governance structure. Due to regulatory restrictions, the title "Shari'ah Advisory Council" was changed to Advisory Committee of Experts (ACE) by the CBN under the Guidelines for the Governance of Advisory Committees of Experts for Non-Interest (Islamic) Financial Institutions in Nigeria 2015. An appointment into an ACE, which shall comprise three members under item 5.3.1 of the 2010 Guideline, is subject to approval of the CBN. Under item 5.2 of the 2010 Guidelines (CBN, 2010a), qualifications of persons to be appointed members of an ACE include being skilled in Shari'ah (Islamic Law) and/or *usul-al-fiqh* (Islamic jurisprudence), a sound mastery of written Arabic, including proficiency in spoken Arabic as well as English, in addition to acquaintance with the field of business and finance notably Islamic finance among others.

The ACE is in charge of all decisions on Shari'ah as well as opinions and views thereon; it is responsible for advice on Shari'ah matters to the NIFI's management and board in order to ensure Shari'ah compliance in the institution's operations. In order to operate effectively, the ACE plays its roles independently, with confidentiality, competence and regularity duly enshrined as its working principles. An ACE that operates independently would garner public confidence and thus bring about the desired expansion and development of the Islamic finance industry generally. According to paragraph 8(ii), the Guidelines require a NIFI to be responsible for the implementation of its ACE's advice on relevant matters. Paragraph 9 requires all cases of non-compliance with the Shari'ah to be recorded and reported to the Board of Directors (BOD) by the ACE which shall also recommend appropriate remedial measures. If such non-compliance is not addressed, or no remedial measures are taken by the concerned NIFI, the ACE shall inform the CBN. However, the Guidelines appear silent as to regulatory sanctions against the NIFI in this circumstance.

Paragraph 9.2 of the Shari'ah Governance Guidelines provides that when conflicting opinions do not give way to a unanimous position pertaining to a Shari'ah ruling among an ACE's members, the NIFI's BOD is mandated to refer the matter to FRACE at the CBN. The FRACE is authorised to determine the position on such matter with finality.

Established in 2013 as a national advisory body on Islamic banking and finance, FRACE is provided for and located at the CBN originally by virtue of section 9.1 of CBN Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria (Non-Interest Banking Guidelines)[19]. Accordingly, the CBN has issued guidelines that specifically direct the activities and general operations of FRACE. The guidelines, designated as "Guidelines on the Governance of Financial Regulation Advisory Council of Experts for Non-Interest (Islamic) Financial Institutions in Nigeria, 2015" (FRACE Guidelines), specifies among others the responsibilities and duties of this experts' council as well as its composition and members' qualifications. The FRACE is the highest Shari'ah governance body in Nigeria for the Islamic or non-interest finance industry.

Paragraph 4.0 of the FRACE Guidelines states that it is to be composed of a minimum of five members and that appointment thereto is made by the CBN for two years. (Subject to satisfactory performance, it is renewable for another two years). A member shall not be a corporate body or institution but an individual person. It is required of the member to have the minimum requisite skills, knowledge and expertise in the field of *usul-al-fiqh*, having specialised in Islamic commercial jurisprudence. In addition, a member shall demonstrate expertise and mastery in Shari'ah and proficiency in written and spoken Arabic and

English, in addition to acquaintance with the fields of economics, business and finance, particularly Islamic finance, among others.

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Duties and responsibilities of financial regulation advisory council of experts

Specifically, under section 6.1 of the 2015 Guidelines, FRACE has been assigned various responsibilities and duties. Some of these responsibilities and duties are administrative and routine and are rendered to both individual financial institutions and regulators alike.

Upon request, FRACE renders assistance, in the form of expert opinion, to the CBN as well as the Securities and Exchange Commission (SEC), the National Insurance Commission (NAICOM) and other regulatory agencies of the Nigerian financial system. The expert opinion is in relation to Shari'ah issues of matters that are referred to it by these respective regulators and individual NIFIs. Such matters include new financial instruments and products/services devised and/or formulated by the CBN and other financial regulatory bodies or those referred to the CBN by NIFIs. Additionally, FRACE offers juristic opinion in writing on the said new financial instruments and products/services. In the same vein, applications for new services/products and advertisement material from NIFI's are validated and endorsed by FRACE to ensure their compliance with the Shari'ah.

FRACE also serves as arbiter in the event of conflicting opinions among an ACE's members as well as between a NIFI's ACE and BOD in Shari'ah matters. Its opinion on such matters is final. It studies problems related to Islamic jurisprudence that face NIFIs as well as relevant financial sector stakeholders and provide expert opinion thereon. It also undertakes vetting of selected persons before the CBN confirms their appointments as members of an ACE, and undertakes other relevant tasks as specified by the CBN management when the need arises.

Responsibilities of Central Bank of Nigeria towards financial regulation advisory council of experts

To enable FRACE to efficiently perform its responsibilities and duties, the CBN shall, under section 7.0 of FRACE Guidelines, discharge certain responsibilities and duties towards it.

Most importantly, the CBN is required to refer to FRACE for advice on all issues pertaining to Shari'ah commercial jurisprudence in relation to NIFIs and their products/services. Accordingly, before the CBN approves any new NIFI products/services, it shall ensure that such products/services have been duly appraised and validated as complying with required Shari'ah principles by FRACE. Moreover, the CBN is required to provide FRACE access to all documents and resources necessary for the effective performance of its responsibilities and duties. In this regard, members of FRACE shall be remunerated commensurate with the responsibilities and duties they are expected to discharge. The CBN shall likewise adequately support FRACE in the unceasing professional development it needs in order to carry out its duties efficiently.

Financial regulation advisory council of experts's Shari'ah governance scope, capability and limitation

It should be acknowledged that FRACE's functions undoubtedly provide wide coverage on Shari'ah governance and foster Shari'ah compliance. However, it is equally worth noting that none of FRACE's duties and responsibilities has anything to do with the court of law or arbitrators that would handle Islamic finance disputes.

This means that the Shari'ah governance framework envisaged by the Shari'ah Governance Guidelines, despite wider coverage, does not extend to courts and arbitrators in playing their adjudicatory role in Islamic finance disputes. This omission does not come as a

surprise since FRACE is a creation of the CBN. The judiciary is not, and cannot be, under the purview of the CBN. Being a regulator of the banking and finance industry, the CBN cannot spell out guidelines or dictate how courts shall go about matters of adjudication. As it is, therefore, FRACE is rather an administrative body at the CBN to help in the Sharī'ah governance oversight of the CBN as a regulator of NIFIs under its purview and in the manner dictated by the guidelines establishing it.

Succinctly put, in the words of an erudite scholar interviewed in this research[20]:

The CBN cannot regulate the courts [. . .] a provision in the law should say that any Sharī'ah issue before the court should be referred to FRACE will be the best. This should be provided by the law. Why by a law? Because we need certainty in the market and in the manner of settling disputes of the market, otherwise there might be no certainty, and that has its implications.

This scholar stressed further the point that FRACE is given the legal legitimacy by CBN to determine Sharī'ah compliance of Islamic banking business of CBN and IFIs and not to provide advice to the courts or arbitrators. The suggestion of this scholar that law should provide an avenue for courts to refer matters to FRACE was equally shared by other respondents interviewed as a solution to Sharī'ah governance in Islamic finance matters before the civil courts.

The researchers thus suppose that the aid needed by the civil court to properly decide on Sharī'ah issues in Islamic finance could be appropriately attained by law whereby courts would resort to FRACE for advice in such matters. It so appears that this would enable civil courts to adjudicate Sharī'ah issues in Islamic finance disputes.

Court referral and role of expert opinions to adjudicate Sharī'ah issues in Islamic finance disputes

Based on the foregoing and given the circumstance of civil courts handling Sharī'ah issues in Islamic finance disputes, court referral to FRACE would ordinarily stand a workable option so that FRACE can serve as a source for obtaining experts' opinion to adjudicate on such issues. In this way, much can be gained to develop adjudication of Islamic finance disputes with predictability and certainty of legal safety and Sharī'ah compliance. Generally, the idea behind it is that of a ready-made, harmonised and standardised national source of opinions and *ijtihad* (legal reasoning). The idea can be materialised by tapping from the pool of experts in FRACE to adjudicate and determine Islamic finance disputes in Nigeria. This idea would prove handy, having regard to the general dearth of experts in Islamic commercial jurisprudence to share in opinions. Moreover, the civil courts are saved the trouble of receiving conflicting opinions by different experts over the same matter.

This issue was elucidated further by respondents interviewed in the course of explaining the need for experts to guide the civil courts in deciding on Sharī'ah issues. In the words of one of them[21]:

The courts would go for experts' opinion on this. They would invite scholar 'A' and scholar 'B'. Now, from experience, as it is noticeable in certain English Islamic finance cases such as *Shamil Bank v. Beximco Pharmaceuticals*, that courts actually referred to experts, and got them testified. But the danger is that experts give conflicting opinions. So, the courts have to finally decide their own way. So, this is the complication of referring to experts for opinion on Sharī'ah issues [. . .].

In the words of another respondent[22]:

Usually courts will take expert opinion on Sharī'ah issues. But when they take expert opinion, they always have different views, different opinions, different interpretations, so there is no certainty in expert opinions on Sharī'ah issues related to Islamic finance. It is very much an

ijtihād in nature where you can find one scholar saying this is allowed and another saying it is not allowed. That affects the industry as market players will feel uncertain as to the view a court is going to take in their matters.

Thus, the practice of referring Sharī'ah issues in Islamic finance matters for experts' opinion often appears to fall short of yielding the desired result. This is because opinions often lack uniformity and standards, while they are subjective to individual experts own standing and jurisprudential background, thus giving room for discrepancies in the same matter. This might not guide the courts but instead mislead them, with all the attendant consequences for the Islamic finance matter at hand. This demonstrates the danger generally associated with expert opinions and the desirability of a single authority as a source of guidance in that regard.

Courts versus Sharī'ah governance body for Islamic finance: issues and prospects in court referral to financial regulation advisory council of experts

Courts of law always guard with jealousy the confines of their power and independence against anything that may appear to encroach upon or restrict them. They have enjoyed an age-old discretion in determining whom to refer to or subpoena for expert testimony in order to decide on any matter. However, a circumstance may warrant a departure from a particular tradition in handling certain technical matters. This is with a view to reach certain ends in preserving issues of economic and public concern[23]. In these circumstances, courts can be directed by law as to where to obtain a guide from a nationally certified body of experts to advise them accordingly. In this regard, FRACE appears the sole, ready-made body to be so provisioned and designated.

FRACE is a potential tool despite its scope and capability of being constrained by the establishing instrument. According to one legal luminary, a respondent[24] in this research:

[. . .] having a body that is like a single expert opinion, whose authority can even be binding on the court by law, I think is the best. So, if we have such then that would have been better for Nigeria [. . .] We have FRACE, but there is no link between FRACE and the courts. So, this is where I feel we may need some legislative reforms to move forward [. . .] I mean having only the guidelines for non-interest banking is not enough.

Court referral and Sharī'ah governance for adjudicating Islamic finance disputes in Malaysia: lessons for Nigeria

Malaysian Sharī'ah governance regulations are unparalleled in many perspectives and stand as a model for other jurisdictions. With the promulgation of its Islamic Financial Services Act (IFSA) in 2013, an unmatched record was created in Islamic finance regulation. The IFSA prepares for and facilitates progress towards developing regulatory as well as governance frameworks in favour of end-to-end Sharī'ah compliance for all Islamic finance operations in the country. The law offers an all-inclusive legal framework that focuses on thorough compliance with the Sharī'ah in every facet of regulation and oversight over IFIs, from licencing and authorisation to liquidation. In particular, this piece of enactment provides mechanisms for entrenching Sharī'ah compliance and to guard against the risk of Sharī'ah non-compliance. Accordingly, the law makes it a statutory duty upon IFIs to ensure full compliance with rules of Sharī'ah in their business operations, aims, affairs and all other activities[25].

Precisely, a Sharī'ah committee is required to be established under section 30(1) of the IFSA 2013 to advise an Islamic bank or IFI on its activities and/or operations. The Sharī'ah committee is properly positioned within a bank or IFI, to function as its advisor in ensuring

that its business, activities and operations are conducted in a Shari'ah-compliant way and manner. As for conventional banks, conventional financial institutions or licenced investment banks authorised to offer Islamic banking and finance services, section 14(2)(a) of IFSA 2013 requires them to fulfil Shari'ah governance and prudential requirements. Also, section 15(7) of FSA 2013 requires them to seek the advice of their Shari'ah committees on their daily Islamic banking business to ensure compliance with Shari'ah principles.

In view of this, section 28 of IFSA 2013 in general terms declares Shari'ah compliance a statutory duty upon concerned institutions, with penalty against contravention[26]. Therefore, the Shari'ah committee of an IFI, including its BOD and entire management, designated and considered the first tier or internal Shari'ah governance infrastructures, are all bound to be Shari'ah-compliant in their operations. A second tier of Shari'ah governance infrastructure is the SAC which is external to IFIs as well as a national body to regulate Shari'ah governance of all, including regulators such as the Malaysian Central Bank (Bank Negara Malaysia - BNM) and Securities Commission Malaysia (SC).

Shari'ah Advisory Council as a national body for Shari'ah oversight

Under section 51 Central Bank of Malaysia Act (CBMA) 2009, a SAC is established by the BNM as a national body for the ascertainment of Shari'ah, aimed solely at Islamic finance business. Under section 52, the functions of the SAC are specifically enumerated. Principally, the council serves to determine and/or ascertain the applicable principles and rules of Shari'ah on any financial matter referred to it and to issue a ruling thereon, under the relevant part of the law. The SAC also offers advice to BNM on any of BNM's Islamic finance business activities, transactions and related issues. In addition to such other task and/or function as may be assigned to it by BNM, the SAC equally advises IFIs on Islamic finance matters and any other entity which, by a Malaysian written law, needs to seek such advice from it.

The CBMA 2009 in section 55 mandates BNM to refer to the SAC on anything pertaining to Islamic finance business with respect to performing its functions in accordance with the Act and any other written law that calls for ascertaining the Shari'ah. In effecting its assigned responsibilities and duties, the SAC examines and endorses as valid or otherwise an IFI's submission to it on application of Shari'ah rules in the IFI's services/products under the BNM's supervision. Section 55(2) likewise mandates all IFIs, with respect to their Islamic finance business and operations, to consult the SAC for advice and ruling in order to make sure that none of their business and operations contain any element of inconsistency with the rule of Islamic commercial jurisprudence. In this regard, the SAC is said to epitomise the best single source of authoritative expert opinion for an Islamic finance jurisdiction.

With respect to Shari'ah issues in capital market activities, section 31ZI of Securities Commission (SC) Act 1993 requires the SC, within its regulatory purview, to establish an SAC for the Islamic capital market (ICM). This SAC is the prime authority for the determination of applicable Shari'ah principles in ICM transactions and business. The SAC at the level of the SC is a structure to institute Shari'ah governance for ICM activities. Furthermore, IFIs that are involved in or partake in *shukūk* and other ICM products have their respective Shari'ah committees or registered Shari'ah advisers under section 31ZP of the SC Act. This SAC has similar mandate, functions and powers as the one established under CBMA 2009 for BNM and under IFSA for any IFI.

Furthermore, there is also an obligation on the court and/or arbitrator to refer to the written resolutions of the SAC and in its absence to refer to the SAC for ruling under section 56(1) of the CBMA 2009. Under this particular section, a judge or an arbitrator that presides over any matter emanating from Islamic finance business that involves Shari'ah issues is

required to consult SAC rulings that have been issued and already published. As an alternative, particularly where the issue at hand has not been ruled upon, a judge or arbitrator is required to seek the advice of the SAC in order to decide on any matter involving Sharī'ah issues over which they preside. To ensure the bindingness of SAC rulings, the CBMA 2009 provides that any ruling it makes in accordance with a reference made to it under sections 55 and 56 shall be, respectively, binding on the IFIs and the court or arbitrator that makes such reference (s.57 CBMA 2009). In addition, whenever a conflict arises between a ruling issued by the SAC and one by the Sharī'ah committee of an IFI, the former always prevails and applies to the issue in contention (s.58 CBMA 2009). Thus, in Malaysia, civil courts and arbitrators are statutorily mandated to refer matters, in the absence of applicable SAC Sharī'ah rulings thereon, to the SAC whose rulings bind all concerned as held in *Bank Kerjasama Rakyat Malaysia vs Brampton Holdings Sdn Bhd* [2015] 4 CLJ 636. It is however contended that as an expert, the SAC should be able to give an opinion only and it should be up to the courts to decide if they want to follow the opinion or not (Kunhibava, 2015).

Further prevalent in the Sharī'ah governance system in Malaysia is section 29 of IFSA 2013 which makes it compulsory on IFIs to adhere to standards that have been issued by BNM. These standards are based on the resolutions of the SAC. Thus, Sharī'ah decisions of the SAC are issued as standards by BNM, and section 29(6) of IFSA 2013 makes failure to comply with these standards an offence.

Sharī'ah Advisory Council and the question of usurpation of courts' jurisdiction: a contention settled

The court referral so established under the law as explained above became an issue of contention before the court in Malaysia. This issue was whether the SAC usurps the jurisdiction of courts when it is empowered to ascertain Sharī'ah issues in matters of Islamic finance before the civil courts and the courts so mandated to refer to it for that purpose. This contention came up before the Kuala Lumpur High Court in the case of *Mohd Alias bin Ibrahim v. RHB Bank Bhd and Anor* [2011] 3 MLJ, 26 and was ruled in the negative. The court held that the SAC is established in effect as a supervisory agency responsible for harmonised and standardised interpretation of the Sharī'ah in the context of Malaysian Islamic banking and finance. Referring to section 52 of CBMA on SAC's functions, the court accentuated the fact that the SAC is an authority established to ascertain applicable rules of the Sharī'ah intended for the businesses of Islamic banking and finance as well as *takāful*. It was made clear in this case that when a court refers a question to the SAC under section 56 (1)(b) of CBMA, the SAC needs to merely ascertain the applicable Sharī'ah rules to the question and not to determine the question. This is because the SAC is established mainly to serve as a specialised committee in the Islamic finance domain that helps to promptly ascertain Sharī'ah rules in a matter of finance. This decision was approved by the Court of Appeal in *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd* (2012) 4 CLJ 794. At paragraph 24 of the judgement the Court of Appeal clearly stated 'the statutory duty and function of the SAC is to ascertain Islamic financial matters or business only. It does not hear evidence nor decides cases' (*Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd* (2012)). Consequently, civil courts are in essence expected to welcome the SAC's functions of ascertaining the rules of Islamic law that is to be applied in deciding relevant matters before them (Mohamad and Trakic, 2012).

However, the matter on the constitutionality of the SAC's decision being binding on the courts was deliberated before a nine-bench Federal Court in the first half of 2018 in the case of *Kuwait Finance House (Malaysia) Bhd v. JRI Resources Sdn Bhd and Ors*.

(Khairulrijal, 2018). The decision of the Federal Court was delivered on 10 April 2019 to the effect that Sections 56 and 57 of the CBMA are valid and constitutional (Yatim, 2019). Therefore, this decision establishes previous judgments and confirms the SAC's role in ascertaining applicable Islamic law to Islamic finance disputes as constitutional. At this point, the question of whether the SAC is usurping the jurisdiction of the courts has been settled in the negative and with finality.

The way forward for adjudication of Islamic finance industry disputes in Nigeria

Certainly, expert opinion has been relevant in adjudication yet it can be unreliable to base a decision solely on its merit due to the fact that it is highly influenced by subjectivity in individuals' conviction as well as variations of their understandings from the perspective of a particular school of jurisprudence (*madhhab*). Consequently, it is not always the best as a source of guidance for civil courts to decide on Sharī'ah issues in Islamic finance disputes, even where it is the only available source of guidance to the courts. However, expert opinion can be unified, harmonised and standardised via an appropriate authority, at least for consumption of a particular Islamic finance jurisdiction. Therefore, regardless of jurisprudence and interpretation, it appears safer and more convenient for a single voice to serve as the source of expert opinion for all persons, businesses and authorities. This will not only steer the quest for certainty and stability in sharing expertise but will also promote standardisation of the myriad of juristic differences when it comes to issues of Islamic finance generally.

In Nigeria, FRACE, with appropriate empowerment, provides the prospect of offering the required aid to civil courts and arbitrators and bolstering their role of providing Sharī'ah-compliant adjudication of Islamic finance disputes. Accordingly, FRACE needs to be a supervisory authority that regulates Sharī'ah governance across the board and provides standardised interpretation of Islamic law in matters of Islamic banking and finance in the country.

Recommendations and conclusion

Sharī'ah compliance is an essential feature of Islamic finance, one that truly identifies it as Islamic in object and purpose. Ensuring Sharī'ah compliance of Islamic financial dealings is, therefore, an important regulatory priority in any Islamic finance jurisdiction. However, Sharī'ah compliance would be a mirage if it cannot be ensured at the dispute resolution stage. Ensuring Sharī'ah compliance in the event of dispute resolution is paramount as it enables projecting Sharī'ah governance as an end-to-end requirement that fosters not only compliance but also legal certainty and safety of investments. As the Islamic finance system grows and develops in Nigeria, so also does the possibility of Islamic finance litigation, with a tendency toward complication and sophistication. Thus, the courts and judges responsible to handle the situation should be prepared with equal or greater sophistication. This is with a view to ensure the sustainability of the system and investments therein.

The court of law is an important regulatory mechanism of Islamic finance, and as long as it remains so its role in upholding or wreaking havoc on Islamic finance transactions should be discerned. This will help determine how the court will be aided, supported and/or preserved for the important task of adjudicating Islamic finance. In this regard, Nigeria stands to learn much from the practice of Malaysia and its development in terms of laws, structures and facilities. Thus, for Nigeria as well, laws should be the backbone to enable the courts to acquire all needed jurisdiction and

judicial prowess. This is in addition to mandating them to refer to FRACE in matters of Sharī'ah and for its ascertainment to be applied to relevant cases. Accordingly, FRACE should have its Sharī'ah resolutions published to be referred to by the courts to facilitate trials. The courts would refer to FRACE directly only in matters where no resolution has been issued yet. However, unlike the current Malaysian position where the ruling of SAC shall be binding, and to avoid questions of constitutionality, it should be up to the courts upon receiving the ruling of FRACE to determine whether to apply it to the facts of the case. That discretion should be left to the courts.

Further, as in Malaysia, the CBN should issue standards for the Islamic finance industry based on the rulings of FRACE. In addition, training to equip judges with requisite skills and knowledge in Islamic financial jurisprudence should be made part of judges' continuous mandatory judicial training. When the establishment of FRACE is backed by a law that arms it to offer binding advice to the court of law, the stage will then be set for sound, legally safe and Sharī'ah-compliant decisions from civil courts in Islamic finance matters. For these to take off and be operational, a new law needs to be enacted, the equivalent of the Malaysian IFSA 2013, whereby Islamic finance and all issues pertaining to Sharī'ah governance can be catered for. Additionally, the CBN Act 2007 should be amended to explicitly provide for Islamic finance and NIFIs within the regulatory purview of the CBN. Again, the laws so enacted and/or amended need to categorically provide for Sharī'ah governance and compliance in Islamic finance as a statutory duty upon NIFIs, with appropriate sanctions in the event of non-compliance.

When legal issues become intertwined with Sharī'ah non-compliance issues due to the absence of legislation and requisite personnel expertise, stakeholders may find it difficult to attain the desired sustainability of Islamic finance. Hence, it is the researchers' view that a statutorily backed FRACE, issuing advice and resolutions to competently equipped courts would assuage the legal and Sharī'ah non-compliance risks and establish a sound practice that is robust and sustainable in Nigeria. In addition, lawyers and judicial officers in Islamic finance litigation are not left out in the quest to build a competent judiciary for Islamic finance dispute resolution.

Notes

1. This practice takes place in both civil and common law-based legal systems as, for instance, illustrated by the UK case of *The Investment Dar Company KSCC v. Blom Developments Bank Sal* (2009) EWHC 3545 (Ch).
2. Risk of Sharī'ah non-compliance has been defined as the "risk that arises from an IFI [Islamic financial institution] failure to comply with the Sharī'ah rules and principles determined by its Sharī'ah board or the relevant body in the jurisdiction where the IFI operates" (IFSB, 2005). This definition appears restrictive, as it does not envisage the possible failure to apply the required rule of Sharī'ah in judicial dispute resolutions; i.e. where the court of law upholds an otherwise Sharī'ah non-compliant transaction in its decision over a particular Islamic finance dispute. This is a Sharī'ah non-compliance event occasioned by legal risk and it is the type of Sharī'ah non-compliance risk envisaged and referred to by this research work.
3. Financial Regulations Advisory Council of Experts (FRACE) is an essential component of the Sharī'ah governance structure for Islamic financial institutions (IFIs) in Nigeria. Located at the Central Bank of Nigeria (CBN), it functions as a national Sharī'ah governance body.

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4. Most of the works on Nigeria's Islamic finance litigations employed traditional legal research technique of doctrinal method. Examples of such works include Sambo and Abdulkadir (2013); Oseni (2011, 2015a, 2015b), among others.
 5. Advisory Committee of Experts (ACE) is part of the Sharī'ah governance structure established at the level of individual IFIs in Nigeria. It is the equivalent of Sharī'ah Committee or Sharī'ah Board as designated in other jurisdictions.
 6. The validity of law or regulation that backs the formulation of a particular product/service would be said to hang in the balance in the event of conflict with other laws. This is notwithstanding the effectiveness and compliance levels with the law or regulation. Thus, the certainty of the court's interpretation/pronouncements, where necessary, must be ensured through decisive and positive harmonisation of current laws. The power of the court to make such interpretation/pronouncements is an established principle of the law, enshrined in s. 315(3) of the 1999 Constitution of Nigeria (as amended).
 7. Principal of such guidelines are the "Guidelines for the Regulation and Supervision of Institutions Offering Non-Interest Financial Services in Nigeria", issued via circular No. FPR/DIR/CIR/GEN/01/010B on 13 January 2011. Subsequently, two other supporting guidelines, provided for under the principal one, were issued: (1) "Guidelines on Shariah Governance for Non-Interest Financial Institutions in Nigeria"; and (2) "Guidelines on Non-Interest Window and Branch Operations of Conventional Banks and Other Financial Institutions". The CBN issued the principal guidelines by virtue of its power as the regulator of the Nigerian finance industry under the provisions of section 33(1)(b) of the CBN Act 2007 and sections 23(1)(5); 55(1); 59(1)(a) and 61 of Banks and Other Financial Institutions Act (BOFIA) 2004 (as amended).
 8. As an end-to-end requirement, Sharī'ah compliance is an all-encompassing phenomenon in Islamic financial operations. Sharī'ah compliance involves everything in Islamic finance and incidences of non-compliance must be eliminated in all ramifications. Certain aspects of Islamic financial operations have been discerned and identified as susceptible to posing Sharī'ah non-compliance risk such that attention needs to be paid on them. These, among others, include legal documentation and its execution; marketing and implementing a financial service or product; the structure of a financial service/product/facility; the conditions and/or terms of the service/product/facility; advertisement as well as related information dissemination system about the service/product/facility, including broadcasting.
 9. Nigeria introduces Islamic finance to garner financial inclusion, particularly regarding its Muslim majority population, as part of the plan to achieve its Financial System Strategy 2020 (FSS2020), popularly known as Vision-2020. The strategy is aimed at enabling Nigeria to become one of the world's 20 largest economies by the year 2020.
 10. Section 4(1)-(3) and Part I, Second Schedule, 1999 Constitution of the Federal Republic of Nigeria (as amended). In this regard, the principal legislation on banking and finance in Nigeria, enacted by the National Assembly, is the Banks and Other Financial Institutions Act (BOFIA), CAP.B3, Laws of the Federation of Nigeria (LFN) 2004 (as amended).
 11. Already there are judicial decisions by the Court of Appeal and the Supreme Court of Nigeria to the effect that jurisdiction in matters bordering on finance, land as well as any contractual dealing (other than personal status) vests with High Courts. This was illustrated by the courts in *Alkali v Alkali* (2002) 1 NWLR (pt. 748), at 453; and *Magaji v Matari* (2006) 8 NWLR (pt. 670), at 722.
 12. From the onset, introducing Islamic finance in Nigeria came with some controversies that even prompted a legal action against the whole initiative. This was an action instituted by Sunday Ogbuji against the Central Bank of Nigeria (CBN) in 2012 at Abuja Federal High Court [*Ogbuji v. Central Bank of Nigeria (CBN)* (unreported)], suit no. FHC/ABJ/CS/710/2011). The action challenged the legality of the CBN Governor's action in issuing guidelines for establishing an

Islamic bank and licensing such a bank under current laws. Although the CBN succeeded in challenging the *locos standi* of the plaintiff, the court nonetheless declared, among others, that the CBN had no power, within contemplation of s.66 of BOFIA to designate a specialized bank as 'Islamic' and the power to do so was with the National Assembly by an Act or amendment to existing laws; and that issuing a licence to a bank so designated and guidelines to govern it were illegal as well. While dismissing the action, the court reiterated that it would have been competent if it were instituted by the Attorney General of the Federation, not an individual. Whereas these declarations are not on record (the action been dismissed on technicality), they portend the vulnerable legal footing of the Islamic finance industry in Nigeria and the possibility of adverse outcomes from litigating Islamic finance matters.

13. A judge of Shariah Court of Appeal, Abuja, Nigeria, text of interview, Wednesday 18 October, 2017. NB: All respondents interviewed in this research agree to be identified.
14. Head, Drafting and Litigation Unit, Legal Department, Jaiz Bank Plc. (Nigeria), text of interview, Wednesday 18 October 2017.
15. Executive Director (Legal and Compliance) and General Counsel, International Islamic Liquidity Management Corporation (IILM), Advocate and Solicitor Supreme Court of Nigeria, text of interview Wednesday 6 September 2017.
16. An Islamic finance consultant, formerly Sharī'ah scholar at ISRA, member Advisory Committee of Experts (ACE) Sterling Alternative Finance, an Islamic window of Sterling Bank Plc, Nigeria, text of interview Thursday 5 October 2017.
17. Issued via Circular FPR/DIR/CIR/GEN/01/010B on June 2011, pursuant to CBN's general regulatory powers under section 33(1)(b) of the CBN Act 2007.
18. By regulation in Nigeria, corporate affairs shall not appear to have religious, ethnic, regional affiliations. Thus, under section 39(1) Banks and Other Financial Institutions Act (BOFIA) 2004 (as amended), it is provided that no corporate entity shall bear the word 'Islam' or 'Islamic' or 'Shariah' among others in its corporate name. Accordingly, Islamic bank and financial institutions in Nigeria are referred to as non-interest banks and financial institutions and they are officially so registered and licenced. See Central Bank of Nigeria (CBN) *Guidelines on Shariah Governance for Non-interest Financial Institutions in Nigeria*, 2010.
19. Issued via Circular No. FPR/DIR/CIR/GEN/01/010 in January 2011, pursuant to CBN's general regulatory powers under section 33(1)(b) of the CBN Act 2007 and sections 23(1) 52; 55(2); 59(1)(a); 61 BOFIA 2004 (as amended).
20. The Executive Director ISRA, international Sharī'ah scholar and member of FRACE, text of interview, Wednesday 27 September 2017.
21. The Executive Director (Legal and Compliance) IILM, *op cit*.
22. The Executive Director, ISRA, *op cit*.
23. Introducing Islamic banking and finance and their governance are initiatives of economic and public interest; the responsibility of protecting investments therein, their legal safety and Sharī'ah compliance rests with the government and its relevant organ such as the legislature (Nigeria National Assembly). It is an initiative that cannot be left to just a regulatory agency (the CBN in the case at hand) to handle.
24. A university academician and member of FRACE, text of interview, Tuesday 17 October 2017.
25. Sections 18 and 28 of IFSA 2013.
26. Section 28 of IFSA 2013 states in part "(1) that an institution shall at all times ensure its aims and operations, business, affairs and activities are in compliance with Shariah; (2) that a compliance by an institution with any ruling of the BNM's Shariah Advisory Council on any of the institution's aims and operations, business, affair or activity, shall be deemed to be in compliance

with Shariah; and (3) that any person who contravenes the Shariah compliance duty commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding eight years or to a fine not exceeding twenty-five million ringgit or to both”.

References

- Ahmed, H. (2014), “Islamic banking and Shari’ah compliance: a product development perspective”, *Journal of Islamic Finance*, Vol. 3 No. 2, pp. 15-29.
- Ainley, M., Mashayekhi, A., Hicks, R., Rahman, A. and Ravalia, A. (2007), *Islamic Finance in the UK: Regulation and Challenges*, Financial Services Authority, London.
- Ayub, M. (2007), *Understanding Islamic Finance*, John Wiley & Sons Ltd, Chichester, England.
- Ayyub, B.M. (2001), *Elicitation of Expert Opinions for Uncertainty and Risks*, CRC Press LLC, New York, NY.
- Buang, A.H. (2007), “Islamic contracts in a secular court setting: lessons from Malaysia”, *Arab Law Quarterly*, Vol. 21 No. 4, pp. 317-340.
- Carnwath, L. (2012), “Judicial precedent: taming the common law”, *Oxford University Commonwealth Law Journal*, Vol. 12 No. 2, pp. 261-272.
- Central Bank of Nigeria (CBN) (2010a), “Guidelines on Shari’ah governance for non-interest financial institutions in Nigeria”, available at: www.cbn.gov.ng/OUT/2011/CIRCULARS/FPR/FINAL%20GUIDELINES%20ON%20SHARIAH%20GOVERNANCE.PDF (accessed 27 September 2018).
- Central Bank of Nigeria (CBN) (2010b), “National financial inclusion strategy: financial inclusion in Nigeria”, available at: www.cbn.gov.ng/Out/2013/CCD/NFIS.pdf (accessed 9 July 2018).
- Colon, J.C. (2018), “Settlement of Islamic finance disputes in the United States of America”, in Trakic, A., Benson, J. and Ahmed, P.K. (Eds), *Dispute Resolution in Islamic Finance*, Taylor and Francis, Abingdon, available at: <https://ssrn.com/abstract=3105097> (accessed 27 July 2018).
- Daud, M., Yussof, I.M. and Abideen, A. (2011), “The establishment and operation of Islamic banks in Nigeria: perception study on the role of the central bank of Nigeria”, *Australian Journal of Business and Management Research*, Vol. 1 No. 2, pp. 14-29.
- Faye, I., Triki, T. and Kangoye, T. (2013), “The Islamic finance promises: evidence from Africa”, *Review of Development Finance*, Vol. 3 No. 3, pp. 136-151.
- Ghassen, B. and Lahrichi, Y. (2017), “Uncertainty and risk management from Islamic perspective”, *Research in International Business and Finance*, Vol. 39 No. Part B, pp. 718-726.
- Hikmany, A.-N.H.R. and Oseni, U.A. (2016), “Dispute resolution in the Islamic banking industry of Tanzania: learning from other jurisdictions”, *International Journal of Islamic and Middle Eastern Finance and Management*, Vol. 9 No. 1, pp. 125-142.
- IFSB (2005), *Guiding Principles of Risk Management for Institutions (Other than Insurance Institutions) Offering Only Islamic Financial Services*, Islamic Financial Services Board, Kuala Lumpur.
- IFSB (2009), *Guiding Principles on Shari’ah Governance Systems for Institutions Offering Islamic Financial Services*, Islamic Financial Services Board, Kuala Lumpur.
- Khairulrijal, R. (2018), “First time 9-member federal court sits to determine constitutionality of SAC ruling”, *New Straits Times*, 28 August, available at: www.nst.com.my/news/crime-courts/2018/08/405777/first-time-9-member-federal-court-sits-determine-constitutionality (accessed 14 February 2019).
- Kunhibava, S. (2015), “Legal issues in Shari’ah governance in the Islamic finance industry in Malaysia”, *ISRA International Journal of Islamic Finance*, Vol. 7 No. 2, pp. 55-80.

-
- Lahsasna, A. (2014), *Sharī'ah Non-Compliance Risk Management and Legal Documentation in Islamic Finance*, John Wiley & Sons Pte. Ltd, Singapore.
- Malaysia International Islamic (2014), Finance Centre (MIFC) "Insights: Sharī'ah compliance in all matters. The priority of a robust Islamic finance ecosystem", available at: www.mifc.com/index.php?ch=28&pg=72&ac=67&bb=uploadpdf (accessed 20 July 2018).
- Mirakhor, A. and Haneef, R. (2014), "Islamic finance: legal and institutional challenges", *ISRA International Journal of Islamic Finance*, Vol. 6 No. 1, pp. 115-125.
- Mohamad, A.H. and Trakic, A. (2012), "The Sharī'ah advisory council's role in resolving Islamic banking disputes in Malaysia: a model to follow?", *ISRA Research Paper No. 47*, International Sharī'ah Research Academy for Islamic Finance, Kuala Lumpur.
- Momodou, D. (2013), "Legal framework for Islamic banking and finance in Nigeria", *Electronic Journal of Islamic and Middle-Eastern Law*, Vol. 1, pp. 160-170, available at: www.ejmel.uzh.ch (accessed 6 July 2018).
- Oladimeji, M.A., Muhammad, R.A. and Khairil, F.K. (2015), "Regulatory and supervisory Sharī'ah governance of Islamic banking system: comparative analysis of Malaysia and Nigeria", *Journal of Islam, Law and Judiciary*, Vol. 1 No. 4, pp. 72-90.
- Oseni, U.A. (2015a), "Sharī'ah court-annexed dispute resolution of three commonwealth countries: a literature review", *International Journal of Conflict Management*, Vol. 26 No. 2, pp. 214-238.
- Oseni, U.A. (2015b), "Dispute resolution in the Islamic finance industry in Nigeria", *European Journal of Law and Economics*, Vol. 40 No. 3, pp. 545-564.
- Oseni, U.A. (2011), "The legal framework for alternative dispute resolution in courts with shari'ah jurisdiction in Nigeria, Malaysia and Singapore", unpublished doctoral thesis, International Islamic University Malaysia, Kuala Lumpur.
- Ostien, P. and Dekker, A. (2010), "Sharia and national law in Nigeria", in Otto, J.M. (Ed.), *Sharī'ah Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in past and Present*, Leiden University Press, Netherlands.
- Rasyid, A. (2013), "Relevance of Islamic dispute resolution processes in Islamic banking and finance", *Arab Law Quarterly*, Vol. 27 No. 4, pp. 343-369.
- Rusni, H. (2016), "Sharī'ah non-compliance risk and its effects on Islamic financial institutions", *Al-Shajarah*, Vol. 21 No. 3, pp. 21-39.
- Sambo, A.O. and Abdulkadir, B.A. (2013), "Sharī'ah, constitution and adjudication of Islamic finance disputes in Nigeria", in Dandago, K.I., Muhammad, D. and Oseni, U.A. (Eds), *Essentials of Islamic Banking and Finance in Nigeria*, Benchmark Publishers Limited, Kano, pp. 120-132.
- Soludo, C.C. (2007), "Nigeria's financial system strategy 2020 plan: our dream", paper presented at the Financial System Strategy 2020 [FSS2020] International Conference Abuja, 18-20 June, Abuja, Nigeria, available at: www.cbn.gov.ng/fss/mon/Nigeria's%20Financial%20System%20Strategy%202020%20Plan%20-%20OUR%20DREAM_Prof.%20Soludo.pdf (accessed 24 July 2018).
- Sulayman, H.I. (2015), "Growth and sustainability of Islamic finance practice in the financial system of Tanzania: challenges and prospects", *Procedia Economics and Finance*, Vol. 31, pp. 361-366.
- Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Bhd (2012), available at: [www.kehakiman.gov.my/judgment/file/W-02\(IM\)-3019-12-2011.pdf](http://www.kehakiman.gov.my/judgment/file/W-02(IM)-3019-12-2011.pdf) (accessed 28 January 2018).
- Yatim, H. (2019), "Federal court: Bank Negara's SAC findings on Islamic finance binding on civil courts", *The Edge Markets*, 10 April, available at: www.theedgemarkets.com/article/bank-negaras-sac-findings-islamic-finance-binding-civil-courts (accessed 8 May 2019).

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